



The voice of mid-size communications companies

October 21, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communications: WC Docket No. 16-106

Dear Ms. Dortch:

On October 20, 2016, A.J. Burton of Frontier Communications and the undersigned of ITTA met separately regarding the above-captioned proceeding¹ with Claude Aiken of the Office of Commissioner Clyburn; Nick Degani of the Office of Commissioner Pai; Gigi Sohn and Stephanie Weiner of the Office of Chairman Wheeler, and Lisa Hone of the Wireline Competition Bureau; Amy Bender of the Office of Commissioner O’Rielly; and Travis Litman of the Office of Commissioner Rosenworcel. Genny Morelli of ITTA also participated in the meeting with Mr. Aiken.

As reflected in the comments filed by ITTA in this proceeding, ITTA continues to maintain that the *NPRM*’s (and Fact Sheet’s) proposals contain significant legal and policy shortcomings.² Nevertheless, because the Commission will be considering a Report and Order in this proceeding at its October 27, 2016 Open Meeting, in these meetings ITTA, while preserving its legal and policy objections,³ focused its discussion on issues related to consumer consent, data breach notifications, and implementation timelines.

First, ITTA expressed its general support for the sensitivity-based approach to consumer consent outlined in the Fact Sheet. Nevertheless, ITTA objected to the inclusion of web browsing history and app usage history as being considered sensitive and subject to a requirement that ISPs obtain opt-in consent to use and share such information. Web browsing and app usage history are not considered sensitive by the FTC, although collection and use of

¹ *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, 31 FCC Rcd 2500 (2016) (*NPRM*); Fact Sheet: Chairman Wheeler’s Proposal to Give Broadband Consumers Increased Choice over Their Personal Information (Oct. 6, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341633A1.docx (Fact Sheet).

² See Comments of ITTA, WC Docket No. 16-106 (filed May 27, 2016).

³ See *id.*; Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-106 (filed Aug. 9, 2016).

such data for advertising was widespread when the FTC issued its Privacy Report in 2012.⁴ In fact, the FTC's Privacy Report endorsed an opt-out approach towards web browsing data used for behavioral advertising.⁵ The Commission's avowed approach to consumer choice in this proceeding is "by reference to consumer expectations and context."⁶ Against the backdrop of the longstanding, embedded commercial practice of consumers benefiting from targeted advertising based on web browsing history, consumers do not have the same expectations of privacy in this context as they do with other categories of information that the Fact Sheet identifies. Moreover, the vast majority of consumers do not know whether targeted advertising they receive originates from their search engine, ISP, or some other entity. Therefore, as matters of consumer expectations, context, and regulatory parity between ISPs and edge providers, ITTA urges that the Commission, as with its other delineations of sensitive information categories, conform to the FTC's standards and practices with respect to web browsing and app usage history.

Furthermore, the Commission should find that ISPs have implied consent to market their products and services to their customers. Not only is this firmly grounded in Commission precedent,⁷ it is also consistent with the "Respect for Context" principle in the Administration's

⁴ FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers (2012), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf> (Privacy Report).

⁵ See *id.* at 54. ITTA does not object to including "search terms" as sensitive information whose use and sharing is subject to opt-in consent; this would be included within the "content of communications" that the Fact Sheet identifies as subject to opt-in consent. See Fact Sheet at 2; Comments of the Staff of the Bureau of Consumer Protection of the Federal Trade Commission, WC Docket No. 16-106, at 20 (filed May 27, 2016) (content of consumer communications includes search terms). Nor does ITTA object to the Commission instituting mechanisms to differentiate between use of web browsing and app usage history that inherently contains information otherwise identified as sensitive in the Fact Sheet and such history that does not.

⁶ *NPRM*, 31 FCC Rcd at 2508, para. 18.

⁷ To the extent that such marketing would involve a customer's Customer Proprietary Network Information (CPNI), the Commission has found that authority exists under Section 222(c)(1) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 222(c)(1), for the Commission to delineate circumstances under which customers have given implied consent to the provider's use of CPNI to market its products and services to its customers, and the Commission has outlined a "total service approach" for when implied consent exists. See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, 8080-81, paras. 23-24 ("We believe that the language of section 222(c)(1)(A) and (B) reflects Congress' judgment that customer approval for carriers to use, disclose, and permit access to CPNI can be inferred in the context of an existing customer carrier relationship. . . . We are persuaded that customers expect that CPNI generated from their entire service will be used by their carrier to market improved service within the parameters of the customer-carrier relationship. . . . [W]ith the likely advent of integrated and bundled service packages, the 'total service approach' accommodates any future changes in customer subscriptions to integrated service."); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*; *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14866-67, paras. 6-7 ("As service relationships expanded . . . so too did the parameters of the permissible use of CPNI to market new
(continued...)

Consumer Privacy Bill of Rights⁸ that the Fact Sheet touts aligning with as to a sensitivity-based approach to consumer choice.⁹ In fact, the Administration's Consumer Privacy Bill of Rights specifically contemplated implied consent in these circumstances.¹⁰ In the face of Commission precedent with respect to Section 222 of the Act, current Commission rules,¹¹ and the Administration's Consumer Privacy Bill of Rights, there is no reason the Commission should impose an opt-out standard that will subject to ISPs to the Commission's complaint and enforcement processes when marketing their products and services to their customers. ISPs should be free to tailor marketing of their own products and services to their customers based on their perceived consumer relations needs.

ITTA also sought to ensure that, as an implementation matter, to the extent geolocation information is considered sensitive information subject to opt-in consent with respect to ISPs, such a categorization not expose ISPs that are also voice providers to potential enforcement action when they use and disclose street address information as required by Section 222 of the Act.¹²

Second, though ITTA previously urged that the Commission not adopt additional federal data breach notification requirements for BIAS providers,¹³ ITTA accepted the data breach notification requirements as outlined in the Fact Sheet, but elaborated upon three points. ITTA reiterated that the notification requirement should be triggered by the ISP's *determination* of the breach.¹⁴ In addition, the Commission should include provisions tolling the period for notifying consumers if any federal or state law enforcement agency advises the ISP that notification of its customers would impede a criminal investigation.¹⁵ The Commission should also allow flexibility for entities to combine breach notifications where the breach affects both broadband and voice customers.

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product offerings. This approach recognizes that the customer may be fairly considered to have given implied consent to the carrier's use of CPNI within the total service package to which the customer subscribes. . . . Such sharing was intended to allow carriers with a pre-existing relationship with the customer to develop 'packages' of services best tailored to their customers' needs.'").

⁸ The White House, Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy (2012), <https://www.whitehouse.gov/sites/default/files/privacy-final.pdf> (Administration's Consumer Privacy Bill of Rights).

⁹ See Fact Sheet at 2.

¹⁰ See Administration's Consumer Privacy Bill of Rights at 17.

¹¹ See 47 CFR § 64.2005.

¹² See 47 U.S.C. § 222(e).

¹³ Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-106, at 2 (filed Sept. 30, 2016).

¹⁴ See *id.* at 3.

¹⁵ One ITTA member reported having received one such tolling request from a state law enforcement agency, pursuant to comparable state regulations, during the past two years.

Finally, we advocated for a two-year implementation period for whatever rules the Commission adopts in this proceeding. The implementation burdens on providers promise to be massive, and providers will need to factor these substantial costs into their budget cycles for *next* year and beyond. In addition, mid-size and smaller providers have limited IT resources to engage in the significant web development exercises that will be entailed to properly and accurately notify their customers and other consumers concerning the new privacy requirements. Furthermore, given that the Commission would be adopting a new privacy regime that diverts in numerous facets from the FTC's tried-and-true approach and may also change the current CPNI rules,¹⁶ an extensive consumer education campaign will be entailed to help consumers understand precisely what their rights and responsibilities are under the new regime.

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

/s/

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Vice President, Regulatory Affairs

cc: Gigi Sohn
Stephanie Weiner
Claude Aiken
Travis Litman
Nicholas Degani
Amy Bender
Lisa Hone

¹⁶ See, e.g., *NPRM*, 31 FCC Rcd at 2536-37, 2553, paras. 103-05, 152-53 (seeking comment on whether the Commission should harmonize required privacy notices regarding the use of customer information for voice, video and broadband services, and on whether the Commission should take steps to harmonize the existing customer approval requirements for voice services with those requirements proposed in the *NPRM* for ISPs).